IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 483 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

HAVABIBI W/O HAIDERMIYA MOHMEDALI

Versus

FATEHMOHMED DOSMOHMED

Appearance:

MR GIRISH D BHATT for Petitioners

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 04/02/98

ORAL JUDGEMENT

This appeal is directed against an order dated 30th September, 1988 by which the appliction of present Appellants for setting aside the ex-parte decree passed against them in Civil Suit No. 1228 of 1983 on 5th February, 1988 was rejected.

I have heard the learned counsel for Appellants. No one has appeared for respondents inspite of service

when the matter was called out on 3rd February, 1988, nor any one has appeared today when the matter was being called out twice.

The facts necessary for the present purpose as appearing from the order under appeal may be noticed.

That on 29-1-1988, Suit was posted for recording evidence of the Plaintiffs. No one had appeared for Defendants on that date. The Court recorded evidence of the plaintiffs ex-parte and the matter was adjourned for pronouncement of judgment. The judgement was pronounced on 5th February, 1988 and the plaintiffs' suit was decreed. Having come to know about this, an application was moved before the learned Trial Judge for setting aside the ex-parte decree. It was urged on behalf of Defendants-Appellants that Mr. Vanjara who was incharge of the case on behalf of Mr. Qureshi for Defendants had to abruptly proceed to Navsari and when Defendant No. 2 on coming to the Court knew about absence of Mr. Vanjara, he contacted the Clerk of the advocate to move an application to the Court for adjournment. However, "no objection" from the learned advocate for Plaintiffs could not be obtained in time, for submitting the application for adjournment. Before application could be tendered, evidence of the plaintiffs came to be recorded and the matter was adjourned for pronouncement of judgment. On this premise, it was stated that there was sufficient cause for non appearance of the defendant-appellant on 29-1-1988, when the case was fixed for recording of evidence of the plaintiffs and decree passed ex-parte against the Defendants be set aside.

The learned Judge referring to seeming discripancy in the affidavit of the learned advocate Shri Amarsinh Vanzara of the applicants about knowledge of the clerk about non-availability of advocate and of the defendant applicant has observed that, "this would in turn also mean that the affidavit of learned advocate filed in the matter cannot be taken to be true." It has been further stated by the learned Judge that, "even otherwise the reasons stated by the learned advocate are not suffient to justify absence in the matter when posted specifically for recording of evidence of plaintiff."

It may be noticed that from the perusal of the order, it is apparent that the fact that learned advocate for the present Appellants Mr. Vanzara has gone out of station and was not available to defendant was not in dispute. Reference may be made to the plea of the learned advocate for the Plaintiffs-respondent noticed by

the Court in the following term, "that when the matter is posted in the court for hearing, he should report to the Court in the matter. Even his clerk was knowing this fact still no steps were taken by the defendants-Applicants in the matter. It is further stated by the learned advocate that when he contacted the clerk of the defedant's advocate, he was informed that the concerned advocate was out of station. Thus, according to him, there is no valid reasons for setting aside the decree passed in the matter".

There was no dispute about the fact that learned advocate has actually gone out of station and was not available on 29-1-1988, and reason for lawyers absence was not a pretext. It is also nobody's case that lawyer's absence was pre-set and known to all concerned reasonably in advance to make alternative arrangement. In these circumstances, it is not reasonable to expect that a litigant be subjected to additional costs of engaging other legal assistance forthwith in unforseen circumstances. At best, it could be said that defendant has not promptly appeared in Court and informed the Court about the absence of his lawyer and prayer for adjournment. That in fact appears to be grievance of trial court in rejecting the application. The trial Court was too sensitive to injury to his vanity as appears from the following observations in the order under appeal.

"In any case at least some courtesy is expected to be shown to the Court for not remaining present in the Court when the matter is posted for hearing. This too has not been done."

This goes to show that learned Judge was of the view that there was good ground for adjourning the matter on 29-1-1988, had the defendant shown courtesy to apprise the Court in time about absence of his lawyer. If that be so, case for sufficient cause for absence was made out, though these may not be sufficient cause for not informing the Court before the evidence was recorded. Only former is relevant for considering the application at hand the latter is wholly irrelevant consideration. Failure to inform the Court in time cannot be equated with sufficient cause for absence of party when case is called. It is precisely in such condition situation of making an order in absentia arises.

That apart, learned trial Court has also erred in ignoring the affidavit of the Clerk of the advocate altogether. Having read the affidavits of the learned advocate, his clerk and the applicant, I do not find any

such discripancy as noticed by the learned Judge. In his affidavit, the advocate has clearly stated that on 29-1-1988 he had to leave abruptly in relation to some social obligations for Navsari and he could not inform his clerk before going. Therefore, he was not aware about the same. The affidavit of the Clerk goes to show that when he went to the Court on 29-1-1988, he did not find advocate Shri Amar F. Vanzara, he therefore, inquired from his residence and came to know that due to immediate social obligation he has gone out of station. The applicant in his application has stated that he has come to the Court on 29-1-1988 at about 1.00 p.m and did not find his advocate Mr. Vanzara in the compound. Then he made inquiry in his office and there his clerk informed that the learned advocate would not be coming to the Court. He also disclosed that he has inquired from his residence from where he came to know that advocate has left for outstation on some social obligation. All the three affidavits read together does not show any inconsistency. The advocate's affidavit simply says tht he has left for Navsari without informing his Clerk. Affidavit of the applicant or the clerk does not show that the learned advocate has left after informing any one of them. On the contrary, clerk's affidavit clearly goes to show that he did not know about the advocate having been gone out of station until he inquired at residence. It was only on finding him not available in the court compound when he inquired at his resident that he came to know that the advocate was not available for the day and was out of station. Obviously, in these circumstances, when the applicant has come to the court at 1.00 p.m by that time the Clerk of the learned advocate on his own efforts has acquired the knowledge about the advocate's absence and informed the client about the same. It, however, does not render in any sense the affidavit of advocate incorrect or untrue. This is apart from the fact that discrepancy of this sort even if were to exist, is of such a trivial nature and inconsequential as to affect the substance of the cause shown namely, non-availability of lawyer on his some personal work. It was nobody's case that the laywer has made an excuse to stay away abruptly for the purpose of avoiding the case. In that event, it has to be assumed that lawyer had to leave for outstation on some personal work and was not available. It cannot be said that because a person happen to be lawyer, he ceases to be a social being and has to be oblivious to his social obligations. May be that each and every social obligation, social requirements may not be considered giving sufficient ground for remaining absent from allowing the case in Court and for not making alternative

arrangement, but emergent sitaution calling social response in a given circumstance may furnish a good cause for absence. The learned Judge has not made any reference to the affidavit of the clerk which goes to show that his entire remark about truthfulness of the affidavit of advocate is founded in ignorance of relevant material on record.

The order also reveals that 29-1-1988 was fixed by consent of the parties for the evidence of the plaintiff. The learned Judge has shown his anxiety that when an old plaintiff was attending the Court regularly, the unwarranted adjournments would cause harrassment which ought to be avoided. One very important fact which the learned trial Judge has failed to notice is that the case was fixed for recording evidence of the plaintiff, defendant was not called upon to lead his evidence on that date. It needs hardly to be stated that pleadings do not prove anything by itself. Each fact on which a party relies is to be pleaded and proved by him by leading evidence, unless the same is admitted by otherside. Unless evidence is led, as permissible by law, the stage for hearing of arguments and pronouncement of judgment is not reached. Order 18 of CPC deals with hearing of the SUit and examination of witnesses. Rule 1 of Order 18 envisages that plaintiff has the right to begin unless defendant admits the facts alleged by the plaintiff and contends that plaintiff is not entitled to any particular relief which he seeks. In that event, defendant has right to begin.

Rule 2 of Order 18 of the Code, which is relevant for the present purposes reads as under :-

"2. Statement and production of evidence -

(1) On the day fixed for the hearing of the suit or on any other day to which thehearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

(4) Notwithstanding anything contained in this rule, the Court may, for reasons to be recorded, direct or permit any party to examine any witness at any stage."

Persual of above Rule goes to show that it provides a sort of distribution of calender for proceeding with the trial. In the first instance the party who has a right to begin must lead his evidence in support of the issues, the burden of proving which is on him. After that is done, the other party is to state his case and produce evidence in reply thereto. This is generally referred to as `rebuttal' Than the party beginning may reply generally on the whole case, usually referred to as rejoinder. Sub-rule 4 enables the Court to permit a party to examine witnesses at any stage, that is to say even after the party beginning the hearing and replying have both lead their evidence. Alongwith this provision, provisions of Order 17 may be noticed. It deals with adjournments. In a case where a date is fixed for recording of evidence and one or other party is not present, what the Court is required to do is to be noticed in clause (e) to proviso to Rule 1 of Order 17, which reads as under :-

"ORDER XVII - ADJOURNMENTS :

1. Court may grant time and adjourn hearing -

xx xx xx xx

2. Costs of adjournment -

xx xx xx xx

Provided that, -

(a) xx xx xx

(b) xx xx xx

(c) xx xx xx

(d) xx xx xx

(e) where a witness is present in Court but a party or his pleader is not present or the party or his pleader, though present in Court, is not ready to examine or cross examine the witness, the Court may, if it thinks fit, record the statement of the witness and pass such orders as it things fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be, by the party or his pleader not present or not ready as aforesaid."

This provision takes into account the contingency where a witness of one of the parties is present in the court for being examined but one of the party or his pleader is not available for recording the statement of witnesses. In that event, it enables the Court to record the statement and pass the order as it deem fit for

dispensing with the examination-in-chief or cross examination of the witness, as the case may be. This says if party or his witness is present in the Court but the party calling him and his advocate is not present but the otherside is present, the examination-in-chief by the calling party may be dispensed with and other party may straightway proceed with the cross-examination of the witnesses in the light of pleadings. On the other hand, if the party calling the witness is present and is prepared to go ahead with the examination-in-chief of the witness but the otherside is not present or is not willing to examinate the witnesses, the Court after recording the examination-in-chief may dispense with the cross-examination by the otherside. It does not envisage to conclude the trial on examination of witness and pronounce the judgment thereon, but envisages only curtailment of right of absentee party to examine or cross examine the witness present only. This rule provides what the court can do, if case is not postponed or adjourned for examination of witness present in court. The procedure does not favour conclusion of trial immediately, even at the cost of curtailing the right of party to lead evidence, who is not even called upon to produce his evidence.

Obviously, when a suit is fixed for recording evidence of one party, the other party is not simultaneously required to keep his witness ready to be examined by the Court and the otherside, nor by remaining absent on the date when evidence of otherwise is being produced, he forfeits his right to produce evidence is rebuttal without he being called upon to produce his evidence.

In the present case, from the order itself it is apparent that on 29-1-1988, case was fixed for recording the statement of plaintiff and his witnesses. Defendant was not required to state his case and produce his witnesses and reply as was his right under Order 18 Rule 2 of CPC. If the defendant did not want to cross-examine the witnesses or the plaintiff, he may or may not remain present; even if he want to cross-examine the plaintiff and his witnesses, but he does not remain present when such witnesses were present or even if while remaining present, he was not willing to examine them and his prayer for adjournment is refused, at best, he could have forfeited his right to cross examine those witnesses who were present and whose statements were recorded but it could not have resulted into closure of his evidence without being called upon to produce his evidence. He could be called to produce his evidence only after

plaintiff has closed his evidence on a date fixed thereafter. In no circumstances, the trial Court could have heard the arguments on merit of the case, and pronounce the judgment without giving a reasonable opportunity to defendant to lead his evidence, if any, in rebultal after the plaintiff closes his evidence.

Therefore, in my opinion, the learned trial Court has seriously erred in law in concluding the hearing of the case on 29.1.1988 and adjourn it to pronounce judgement on 5-2-1988 immediately after recording the statement of plaintiff and his witnesses on 29-1-1988. Without giving any opportunity to otherside to lead his evidence in reply, which was his right, and without calling upon defendant to lead his evidence in reply, to adjourn the case for prouncement of judgment affects the very validity of the decree. It, on the face, amounts to be in breach of a fair procedure required to be followed under the Code. Thus, in my opinion, not only the Court below was not right in its approach in dealing with the application for setting aside the ex-parte decree, while considering the existence of sufficient cause of party's absence on 19-1-1988, in the facts and circumstances of the case, the ex-parte decree passed without giving opportunity to the otherside to lead evidence in reply, after plaintiff has closed his evidence merely because he remained absent when witnesses of plaintiff were being examined, makes the decree unsustainable.

Accordingly, appeal succeeds and is allowed. Order under appeal is set-aside. Application for setting aside ex-parte decree is granted and the ex-parte decree passed by the trial Judge on 5-2-1988 in Civil Suit No. 1228 of 1983 is set-aside. He shall proceed with the trial of the Suit from the stage at which it was on 29-1-1988. The statement of witnesses on 29-1-1988 shall remain part of record. However, defendants may be given an opportunity to cross examine those witnesses who are available on payment of cost of Rs. 1000/=. Defendant appellant shall also bear the costs of resummoning those witnesses who have been examined on 29-1-1988. There shall be no order as to costs of this appeal.

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Prakash*